The bill clerk proceeded to call the roll.

Mr. NUNN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

ORDER OF PROCEDURE

The PRESIDING OFFICER. Under the previous order, Senators may now speak out of order for up to 30 minutes each, not to extend beyond the hour of 11 a.m.

INTERPRETATION OF THE ABM TREATY

PART III: THE ABM NEGOTIATING RECORD

Mr. NUNN. Mr. President, in my remarks today, I will present the third segment of my report on the ABM Treaty reinterpretation controversy.

On Wednesday, I addressed the original meaning of the treaty as presented to the Senate in 1972. Yesterday, I discussed the statements and practices of the parties from the time the treaty was signed in 1972 until the reinterpretation was announced in late 1985.

Today I will address the record of the ABM Treaty negotiations in 1971 and 1972 as provided to the Senate by the Department of State.

Mr. President, I again apologize to the Chair and my colleagues for my raspy voice this morning, but I am still battling laryngitis, though it is getting a little better.

In my remarks on Wednesday, I concluded that the Nixon administration explicitly told the Senate during the treaty ratification proceedings that the treaty prohibits the development and testing of mobile/space-based ABM's using exotics. I also concluded that the Senate clearly understood this to be the case at the time it gave its advice and consent to the treaty, and that the evidence of this is compelling beyond a reasonable doubt.

Yesterday, I reviewed the available record of the United States and Soviet practices and statements during the 13-year period between the signing of the treaty and the announcement of the reinterpretation which occurred in October of 1985.

Under both international and domestic law, such evidence may be considered in determining the meaning of the treaty.

Based on the information provided to the Senate to date by the State Department, I found no evidence which contradicted the Senate's original understanding of the meaning of the treaty. On the contrary, I noted that successive administrations, including the Reagan administration, had prior to 1985 consistently indicated that the treaty banned the development and testing of mobile/space-based ABM's using exotics.

Summarizing then, where the situation now stands after the first two reports: First, the Reagan administration made a case for a broader reading of the treaty based, in part, on an analysis of the Senate ratification proceedings, arguing that the record of this debate supported the reinterpretation. I found this case not to be credible. Second, the Reagan administration made a case for a broader reading of the treaty based, in part, on subsequent practice, arguing that the record of the United States and Soviet statements and practices supported the reinterpretation. I also found this case not to be persuasive.

Some advocates of the broader reading—including its principal author, Judge Sofaer—now appear to be hanging their hats on the negotiating record, arguing that this negotiating record provides persuasive or compelling support for their case. As I noted on Wednesday, the administration's focus on the negotiating record as a primary source of treaty interpretation confronts us with three separate possibilities:

The first possibility: If the negotiating record is consistent with the original meaning of the treaty as provided to the Senate by the executive branch, the traditional interpretation would prevail beyond question.

The second possibility: If the negotiating record is ambiguous or inconclusive, there would be no basis for abandoning the traditional interpretation. Absent compelling evidence that the contract consented to by the U.S. Senate was not the same contract entered into between the Nixon administration and the Soviet Union—and we do not have that kind of evidence—the treaty presented to the Senate at the time of ratification should be upheld.

There is a third possibility: If the negotiating record clearly establishes a conclusive basis for the reinterpretation, this would mean that the President at that time signed one contract with the Soviets and the Senate ratified a different contract. Such a conclusion would have profoundly disturbing constitutional implications and as far as I know would be a case of first impression.

Because of the grave constitutional issues at stake, and my responsibilities as chairman of the Armed Services Committee and cochairman of the Arms Control Observer Group, I have taken a personal interest in this matter and have spent countless hours in S-407 reviewing the negotiating record, which is still classified.

It is important to note that the material presented in terms of the negotiating record consists of a disjointed collection of cables and memoranda.

This is not unusual. A lot of people really do not understand what a negotiating record is. It is not a clear transcript of a dialog between the two superpowers as they negotiate around the table—far from that. That is not what a negotiating record is. There is no single document or even set of documents that constitutes an official negotiating history. There is no transcript of the proceedings. Instead, what we have is a varity of documents of uneven quality—some of them precise, some of them well structured, some of them done hastily, some of them simply notes in the margin. Some involve detailed recollections of conversations, others contain nothing more than cryptic comments.

Nonetheless, this is the record on which the Reagan administration's decision was based. If the State Department identifies and submits other relevant documents, I shall be prepared to review them as well. I want to stress to my colleagues that what I have examined is a negotiating record presented by the State Department to the U.S. Senate. If there are other matters which I have not seen, then, of course, my remarks cannot possibly cover those matters. We have been assured that we have been given the negotiating record as known to the State Department.

Having been through the material, I will understand why, as a matter of international law, the negotiating record is the least persuasive evidence of a treaty's meaning. It does not have the same standing, of course, as the treaty itself under international law; it does not have the same standing as the conduct of the parties subsequent to entering into the agreement; it does not have the same standing as the ratification proceedings whereby the Senate takes formal testimony and has formal debate and has formal presentation of matter by administration witnesses. To put this in the right international legal framework Lord McNair, who is an expert on treaties and interpretations thereof, states as follows:

> The preceding review of the practice indicates that no litigant before an international tribunal can afford to ignore the preparatory work of a treaty, but that he would probably err in making it the main plank of his argument. Subject to the limitations indicated in this chapter, it is a useful makeweight but in our submission it would be unfortunate if preparatory work ever became a main basis of interpretation. In particular, it should only be admitted when it affords evidence of the common intention of both or all parties.

This same general view is set forth in the commentary on the second restatement of the foreign relations law of the United States, which notes that "conference records kept by delegations for their own use * * * will usually be excluded" from consideration under international law, although they may be considered by national courts for domestic purposes.

The materials in the negotiating record provided the Senate simply do not compare in quality to the debates and reports normally relied upoon for interpretation of legislation. Nonetheless, the records provided to the Senate contain a significant amount of material bearing on the issue of the development and testing of exotics.

Based on my review, I believe that Judge Sofaer has identified some ambiguities in this record. One cannot help but wish that the United States and Soviet negotiators had achieved a higher level of clarity and precision in their drafting of this accord. Of course, as we in the Senate well know, writing clear law is a worthy goal but one which is not easily attained. These ambiguities are not, however, of sufficient magnitude to demonstrate that the Nixon administration reached one agreement with the Soviets and then presented a different one to the Senate.

I want to repeat that sentence, because I think it is important: These ambiguities are not, however, of such magnitude to demonstrate that the Nixon administration reached one agreement with the Soviets and then presented a different one to the Senate.

Notwithstanding the ambiguities, the negotiating record contains substantial and credible information which indicates that the Soviet Union did agree that the development and testing of mobile/space-based exotics was banned. I have concluded that the preponderance of evidence in the negotiating record supports the Senate's original understanding of the treaty—that is, the traditional interpretation.

I have drafted a detailed classified analysis which examines Sofaer's arguments about the negotiating record at great length. Over the next few days, I intend to consult with the distinguished majority leader, Senator BYRD, about submitting this report for the review of Senators in room S-407. I will also work with the State Department to see how much of this analysis can be declassified and released for public review.

I would, of course, like for all of it to be released.

Mr. President, I believe it is appropriate at this juncture to pause for a moment and reflect on how the administration could be in such serious error on its position on this very important issue. First, the administration, in my view, is wrong in its analysis of the Senate ratification debate. I think I have set that forth in great detail.

Second, I think the Reagan administration is wrong in its analysis of the record of subsequent practice, at least insofar as we have been given information on that subject.

Third, I believe the administration is wrong in its analysis of the negotiating record itself. I believe that we need to take a look at the procedure by which the administration arrived at its position. I think the procedure itself, as people find out more about it, will reveal itself as having been fundamentally flawed.

At the time the decision was announced by the Reagan administration in 1985, the administration was divided as to the correct reading of the negotiating record, with lawyers at the Arms Control and Disarmament Agency, the Defense Department, and even within Judge Sofaer's own office holding conflicting views. By his own admission, Judge Sofaer had not conducted a rigorous study of the Senate ratification proceedings or the record of United States and Soviet practice, even though these are critical—indeed crucial—elements of the overall process by which one interprets treaties. Judge Sofaer made no effort to interview any principal ABM negotiator except Ambassador Nitze—even though most of these gentlemen were still active professionally and living in or near Washington, DC. Finally, there was no discussion with the Senate, despite the Senate's constitutional responsibilities as a conguarantor of treaties.

Mr. President, to say that this is a woefully inadequate foundation for a major policy and legal change is a vast understatement. I hope that we can now begin to address the real problems, begin to address the real problems that confront our Nation in the areas of strategic balance and arms control.

There are a number of specific steps which I believe our Government should take in trying to bring a final resolution to this legal controversy, which I think is an unfortunate controversy. First, I believe the State Department should declassify the ABM Treaty negotiating record after consulting with and informing the Soviet Union of our intentions. The only downside I can see to declassification, since this record is at least 15 years old, is the diplomatic precedent, and that is to be considered. However, if the Soviet Union is informed and consulted in advance of declassification, it seems to me that there would be no adverse precedent.

Second, we must recognize that by upholding the traditional interpretation of the treaty we certainly will not eliminate all the ambiguities with respect to the effect of the treaty. Some ambiguities remain. The United States and the Soviet Union have not reached a meeting of the minds on the precise meaning of such important words as "development," "component," "testing in an ABM mode," and "other physical principles." The appropriate forum for attempting to remove these ambiguities is the Standing Consultive Commission [SCC], as specified in the treaty. I strongly recommened that the SCC be tasked with the very important job of discussing these terms with the Soviet representatives and trying to come to mutual agreement.

Third and most important, we should continue to negotiate toward agreement in Geneva on a new accord limiting offensive as well as defensive systems, which would supersede the ABM Treaty as well as SALT II, and that would, of course, render moot this whole debate about narrow versus broad interpretation. Nothing would be better than to render this argument moot by entering into a comprehensive agreement on offense and defense and to have the terms defined with precision, clear up these ambiguities, and move on into the new arms control era.

Finally, we must develop an objective analysis of what tests are necessary under the strategic defense initiative which cannot be conducted under the traditional interpretation. We were told last year by General Abramson, the head of this project, that there were no tests which would be adversely impacted by the traditional interpretation before the early 1990's. If that has changed, we need to know what changes have taken place and what has driven those changes. I want to emphasize that our Armed Services Committee needs this analysis and we need it before we begin the markup of our committee bill, because any discussion of what this SDI money is going to be used for has to have as a foundation the overall interpretation and the tests that will be conducted thereunder.

I emphasize also that the determination should be based on a sound technological assessment and not on an ideologically driven kind of judgment. It is important for us to know that we are getting an analysis of scientists and not ideologs who have some agenda that has nothing to do with the technology and the tests at hand.

Mr. President, I hope to speak on this subject again in the future. I would like to be able to make my analysis of the negotiating record available to the public, but it is classified so I can only state the conclusions which I have given this morning. I will, however, be filing in the next several days a comprehensive analysis that will be classified. At some juncture in the future, as I have explained, I hope that that will be available for public dissemination.

I also repeat that I hope that we will be able to declassify this whole record. There will be many lawyers who would be interested in the analysis that has taken place. I hope our country could move out of the legalistic debate now and get down to the crucial substance of the SDI Program and the arms control issues with which we are faced.

Mr. President, I should like to read for the RECORD what I think is a very important statement by six former Secretaries of Defense of our country on the ABM Treaty. The statement, dated March 9, 1987, is signed by the Honorable Harold Brown, the Honorable Melvin Laird, the Honorable Elliot Richardson, the Honorable Clark Clifford, the Honorable Robert McNamara, and the Honorable James Schlesinger—as I count it, three Republicans and three Democrats who served under different administrations.

STATEMENT BY FORMER SECRETARIES OF DEFENSE ON THE ABM TREATY

MARCH 9, 1987.

We reaffirm our view that the ABM Treaty makes an important contribution to American security and to reducing the risk of nuclear war. By prohibiting nationwide deployment of strategic defenses, the Treaty plays an important role in guaranteeing the effectiveness of our strategic deterrent and makes possible the negotiation of substantial reductions in strategic offensive forces. The prospect of such reductions makes it more important than ever that the U.S. and Soviet governments both avoid actions that erode the ABM Treaty and bring to an end any prior departures from the terms of the Treaty, such as the Krasnoyarsk radar. To this end, we believe that the United States and the Soviet Union should continue to adhere to the traditional interpretation of Article V of the Treaty as it was presented to the Senate for advice and consent and as it has been observed by both sides since the Treaty was signed in 1972.

HAROLD BROWN.
MELVIN R. LAIRD.
ELLIOT L. RICHARDSON.
CLARK M. CLIFFORD.
ROBERT S. MCNAMARA.
JAMES R. SCHLESINGER.

I thank the Chair, and again I thank the majority leader for giving me the opportunity to make this series of presentations before the Senate.

Mr. President, there are three members of my staff to whom I express my appreciation for the countless hours they have worked on the issues which I have presented during the last 3 days: Mr. Bob Bell of my staff, who is an expert on arms control, formerly worked for the Library of Congress and the Foreign Relations Committee of this body. He has spent several hundred hours in S. 407 reviewing the tedious details of the negotiating record. He is one of six Senate staff members who have had access to those records.

I also express my thanks to Mr. Andy Effron, who is an attorney who formerly served with the Office of General Counsel in the Department of Defense and is now on the Senate Armed Services Committee staff. Although he has not had access to the negotiating record, he has been of tremendous assistance in the analysis of legal and international law matters relating thereto.

Also, I want to thank Mr. Jeff Smith, who is an attorney who was formerly in the legal adviser's office in the State Department and has been a staff member of the Armed Services Committee for the last couple of years. Mr. Smith has many other duties, including advising me on intelligence matters, but he has given us a lot of his time in helping analyze the ABM reinterpretation issue from an international law perspective. So I thank all of these dedicated staff members for very, very long hours on a very tedious but important subject.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

RECESS UNTIL 11 A.M. TODAY

Mr. BYRD. Mr. President, the swearing in of the new Senator from Nebraska will take place at 11 o'clock this morning. No Senator seeking recognition, I therefore ask unanimous consent that the Senate stand in recess until 11 a.m. today.

There being no objection, at 10:30 a.m. the Senate recessed until 11 a.m.; whereupon, the Senate reassembled when called to order by the Vice President.

SENATOR FROM NEBRASKA

The VICE PRESIDENT. The Chair lays before the Senate the Certificate of Appointment of the Honorable David Kemp Karnes as a Senator from the State of Nebraska.

Without objection, it will be placed on file, and the certificate of appointment will be deemed to have been read.

The certificate of appointment is as follows:

TO THE PRESIDENT OF THE SENATE OF THE UNITED STATES

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of Nebraska, I, Kay A. Orr, Governor of said State, do hereby appoint David Kemp Karnes a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the death of Edward Zorinsky is filled by election as provided by law.

Witness Her Excellency our Governor Kay A. Orr and our Seal hereto affixed at Lincoln this 11th day of March 1987.

KAY A. ORR,
Governor.

The VICE PRESIDENT. If the Senator-designate will present himself at the desk, the Chair will administer the oath of office as required by the Constitution and prescribed by law.

Mr. Karnes of Nebraska, escorted by Mr. EXON, advanced to the desk of the Vice President; the oath prescribed by law was administered to him by the Vice President; and he subscribed to the oath in the official oath book.

(Applause, Senators rising.)

Mr. BYRD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. LAUTENBERG). The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONGRATULATIONS FOR SENATOR KARNES

Mr. BYRD. Mr. President, I join with my colleagues in congratulating our new Senator from Nebraska. Mr. KARNES is the 1,782d Senator to have served since the Senate first established a quorum on April 6, 1789.

It is a great honor for him to be a U.S. Senator, and I know I speak for all Senators in saying that we look forward to our service with him in this great institution.

I congratulate him.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. EXON. Mr. President, I am pleased this morning to have the opportunity to take part in the swearing-in ceremony for a very outstanding Nebraskan who is the brand new U.S. Senator.

I just heard over there some of the younger Members of the Senate who indicated that, I believe, DAVID KARNES is by 8 days the youngest Member of the U.S. Senate.

That allows some of our more younger Members to finally move up in seniority in the U.S. Senate. So, for that, they thank you.

I am looking forward to working with my colleague in representing our great State. We have lots of problems, and we will be working on them.

I also want the Senate to know that I went as far as I could possibly go this morning in true bipartisan spirit. Without even checking with the majority leader, I said we would be pleased to seat him on this side of the aisle. He respectfully declined, which indicates, I think, that he already has learned a great deal about the U.S. Senate. I am looking forward to working with him.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The minority leader.

Mr. DOLE. Mr. President, let me echo what was said by the distinguished majority leader and the distinguished Senator from Nebraska, Senator EXON.

Let me also congratulate the Governor of Nebraska, Gov. Kay Orr. We are honored to have her in our presence this morning. She has made an outstanding choice. We also welcome our colleagues from the House side, Congressman BEREUTER and Congresswoman SMITH.

I have told our distinguished and most junior colleague of the body that as No. 100, you do not have any extra duties, but you have no privileges, either.

We will be working together. It will be exciting in the next few days. I think, as we have indicated privately, you do have some big shoes to fill. Ed Zorinsky was a man respected by all of us. He was our friend. We certainly will miss him.